STATE OF MICHIGAN

COURT OF APPEALS

EARL ANSPAUGH and TRINITY OF MICHIGAN, L.L.C.,

Plaintiffs-Appellants,

v

IMLAY TOWNSHIP, IMLAY TOWNSHIP BOARD, and IMLAY TOWNSHIP PLANNING COMMISSION,

Defendants-Appellees.

UNPUBLISHED
April 27, 2010

No. 288010
Lapeer Circuit Court
LC No. 01-030637-CE

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

Per CURIAM.

This exclusionary zoning case is before this Court for the second time. In a prior appeal, this Court concluded that defendant township's zoning ordinance "effectively excludes lawful and otherwise appropriate I-2 [heavy industrial] uses for which there is a demonstrated need." *Anspaugh v Imlay Twp*, 273 Mich App 122, 130; 729 NW2d 251 (2006). Accordingly, this Court "reverse[d] the trial court's grant of summary disposition in favor of defendants and remand[ed] . . . for entry of an order declaring the township's zoning ordinance to be exclusionary with respect to I-2 uses." *Id.* Thereafter, however, our Supreme Court, in lieu of granting leave to appeal, vacated this Court's judgment and remanded the case to the trial court, stating:

> [W]e remand this case to the Lapeer Circuit Court for further hearing, if necessary, and further findings of fact. The Court of Appeals engaged in appellate fact-finding when it concluded that "we too find that the I-2 zoning provided for by defendants is exclusionary," because "there is no direct route of travel" to the property zoned for I-2 use, and consequently "the I-2 land use siting provided by the township is not appropriate to foster the commercial uses to which land designated for I-2 uses must be put." 273 Mich App at 129-130. On remand, the Lapeer Circuit Court shall determine whether, as the Court of Appeals held, "the township's zoning ordinance effectively excludes lawful and otherwise appropriate I-2 uses for which there is a demonstrated need," owing to the unsuitability for I-2 uses of the available routes of access to the I-2 zoned property within the township. In making this determination, the Lapeer Circuit Court shall consider whether there are available indirect routes that provide

> reasonably suitable access to the I-2 zoned property. [*Anspaugh v Imlay Twp*, 480 Mich 964-965; 481 Mich 851 (2007).]

After further proceedings on remand, the trial court determined that there were available indirect routes that provided reasonable access to the I-2 zoned property, and accordingly, entered judgment for defendants. Plaintiffs appeal as of right. We affirm.

The relevant background facts are set forth in this Court's opinion in *Anspaugh*, 273 Mich App at 124-125, as follows:

> In June 2000, plaintiffs applied to rezone property located along Newark Road in defendant Imlay Township from R-1 residential to I-2 heavy industrial. During the various meetings regarding rezoning of this property, defendants acknowledged that I-2 land uses were permissible under the township's zoning ordinance, but no land designated for such uses was currently provided for under the township's land use plan. Defendants indicated, however, that I-2 uses were nonetheless appropriate for properties in the township's I-1 light industrial zoning district located east of M-53. Plaintiffs assert that, on the basis of this and other "direction" by defendants, plaintiff Trinity of Michigan, LLC (Trinity), investigated and ultimately secured a second parcel of undeveloped land that was zoned I-1. Trinity then also applied to rezone a portion of that property from I-1 to I-2. Both requests, however, were denied by the township board in September 2001 as inconsistent with the township's land use plan.
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> In November 2001, plaintiffs filed the instant suit for declaratory and injunctive relief, alleging that the township's zoning scheme was violative of substantive due process and wholly exclusionary, both as applied and on its face, because it "prohibits . . . even the possibility of I-2 uses." An amended complaint, adding allegations that the township's actions and ordinance denied plaintiffs equal protection, was filed in January 2002. . . .
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> . . . Plaintiffs subsequently moved for summary disposition of their claim that the township's zoning ordinance and actions were exclusionary. In response, defendants requested summary disposition of the suit in their favor, arguing that plaintiffs had failed to meet their burden of establishing that the township's conduct or ordinance was exclusionary or otherwise improper. The trial court, determining that defendants had, in the fall of 2004, adopted a new master plan and zoning ordinance that provided for I-2 uses in an area of the township designated as the Graham Road Corridor, concluded that there was no merit to plaintiffs' claim of exclusionary zoning and granted defendants' request for summary disposition.

On remand, the trial court ordered the parties to submit briefs "on the remand issue only (suitable access) as otherwise set forth by the Michigan Supreme Court Order dated December 7, 2007." Plaintiffs argued that there was no direct route of travel to the Graham Road Corridor from either of the only two major thoroughfares servicing Imlay Township, those being M-53 and I-69, and that the indirect route from I-69 was inadequate because of its length, and because of the narrower width and poorer quality of the access roads. As factual support for their claims,

plaintiffs submitted reports prepared by Ray Davis of Davis Land Surveying & Engineering, P.C., and William J. Meinz, a county highway engineer employed by the Lapeer County Road Commission.

The trial court found that neither the longer distance, nor the quality or grades of the access roads precluded reasonable access to the I-2 zoned area in the Graham Road Corridor. It therefore concluded that Imlay Township's zoning ordinance was not exclusionary because there existed "an available indirect travel route that provides reasonably suitable access to the I-2 zoned property as determined by the Imlay township ordinance."

We review trial court's factual findings for clear error. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). Former MCL 125.297a[1] provided:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Under this statute, a zoning ordinance may not totally exclude a land use where (1) there is a demonstrated need for that land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful. *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 167; 667 NW2d 93 (2003). Although defendants challenge whether there is a "demonstrated need" for I-2 zoned property, this issue is beyond the scope of the Supreme Court's remand order. Rather, the pertinent issue is whether defendants' ordinance effectively excludes appropriate I-2 uses because the area zoned for this use, the Graham Road Corridor, is not suitable for such development.

In *English v Augusta Twp*, 204 Mich App 33; 514 NW2d 172 (1994), this Court held that the defendant township engaged in illegal exclusionary zoning against mobile home parks where the only site zoned for this use was chosen because it was inherently unsuitable for such development and the board believed that it would never be developed. Water and sewer services were not available to this site, and it was located immediately adjacent to a toxic-waste landfill and a mere three-quarters of a mile from a federal prison. Further, the vast majority of the site was owned by the township supervisor, who intended to continue to use the property to operate a family farm. *Id.* at 35, 38. And, testimony established that the township board had pressured a zoning official to prevent manufactured housing within the township and that the building department was likewise pressured to limit the issuance of permits for low cost housing in the

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[1] MCL 125.297a is part of the former Township Rural Zoning Act ("TRZA"). That act was repealed by 2006 PA 110, which adopted the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. In *Anspaugh*, 273 Mich App at 128-129 n 2, this Court observed that "the TRZA still controls this case." Neither party challenges this point. In any event, as this Court observed in *Anspaugh*, 273 Mich App at 128-129 n 2, former MCL 125.297a has been recodified in substantially similar form in current MCL 125.3207.

township. *Id.* at 35. Based on these circumstances, this Court concluded that "the zoning of that parcel for mobile homes was nothing less than a subterfuge for the township's unwritten policy of excluding mobile-home parks altogether," and that "in effect, the township ha[d] designated no appropriate site for a mobile-home park." *Id.* at 38.

The circumstances involving the I-2 zoning district in the Graham Road Corridor are not comparable to the illusory mobile home district in *English*. At most, the instant plaintiffs established, through the Meinz and Davis reports, that the route to the Graham Road Corridor is not as convenient as the route to plaintiff Anspaugh's existing Newark Road property. Plaintiffs did not establish that the Graham Road Corridor is inaccessible or unsuitable for I-2 development, or that the site was selected as a subterfuge for excluding I-2 zoning. On the contrary, Davis's report indicated that the route to the Graham Road Corridor passed other industrial approaches and plant entrances in the I-2 zoned land. Moreover, defendants' prior acknowledgment that a Graham Road interchange off of I-69 was "critical" to the successful development of the Graham Road Corridor was not an admission that the Graham Road Corridor is inherently unsuitable for industrial development. Without the intersection, the Graham Road Corridor might not be the most optimal location for an I-2 zoning district, but that does not make it inappropriate for such use.

In *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 698; 600 NW2d 339 (1999), aff'd 463 Mich 675 (2001), this Court held that the plaintiff failed to prove that the defendant city's ban on new billboards within the city constituted illegal exclusionary zoning under MCL 125.592[2] where the plaintiff failed to demonstrate a public need for billboards. This Court explained that "[t]he demonstrated need that must be shown under the zoning enabling act relates to the public need of the residents of the community, not merely to plaintiff's private economic self-interest." *Adams*, 234 Mich App at 699. Although this holding relates more to the issue of whether there is a demonstrated need for the excluded use, it is also relevant where, as here, a zoning authority has designated an area for the use in question, but the challenger contends that the area is not suitable or appropriate for the designated use.

Here, plaintiffs contend that the Graham Road Corridor is inappropriate for I-2 development because the road access is not particularly suitable for asphalt trucks, but that pertains only to plaintiffs' private interest in operating a particular type of industry, not to the public's need for general industrial uses, or to the appropriateness of the Graham Road Corridor for those uses. Likewise, that the road access is not particularly suitable for asphalt trucks does not refute the fact that land in the Graham Road Corridor is currently being put to I-2 heavy industrial use, presumably by way of the same road access about which plaintiffs here complain.

For the foregoing reasons, we conclude that the trial court did not clearly err by finding that there were available indirect travel routes that provide reasonably suitable access to the Graham Road Corridor, and thus, that the Graham Road Corridor was not shown to be inappropriate for I-2 development. Accordingly, defendants have not committed exclusionary

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[2] This statute is substantially similar to former MCL 125.297a, and current MCL 125.3207, except that it prohibits exclusionary zoning in cities, rather than townships.

zoning in violation of MCL 125.297a. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

We affirm.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro